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No. 93-1677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF OKLAHOMA, *Ex Rel.*
OKLAHOMA TAX COMMISSION,
Petitioner,
v.
JEFFERSON LINES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

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QUESTION PRESENTED

Whether the State of Oklahoma may impose a sales tax, measured by the full sales price, on the sale of bus tickets within the State, where a portion of the route for which the ticket is to be used extends outside the State's borders.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Some of the most significant of those issues involve the scope of the limits placed on state and

local taxing authority by the Commerce Clause of the United States Constitution. The Eighth Circuit's invalidation of Oklahoma's sales tax, which is imposed on in-state customers who purchase bus transportation tickets from in-state vendors, raises a serious threat to the well-established power of States to collect taxes on sales transactions occurring completely within their borders (and which are facilitated by a full panoply of state services, such as fire and police protection). Sales taxes are an increasingly important source of revenue for state and local government. *See, e.g.*, Jerome R. Hellerstein & Walter Hellerstein, *State and Local Taxation* 661 (5th ed. 1988) ("The increasing reliance of the States on sales taxes is one of the most significant developments in State finances during recent times."). Hence, this threatened inroad on the ability to collect sales taxes is of significant concern.

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt petitioner's statement of the case and provide only the following summary of points relevant to *amici*'s argument. Oklahoma's sales tax legislation imposes a 4.5% tax on a broad range of sales, including the sale of most forms of tangible personal property and many services. Okla. Stat. tit. 68, § 1354. Transportation for hire is among the types of services whose sale is subject to this general sales tax. *Id.* at § 1354(1)(C). The sales tax is to be paid

[1] The parties have consented to the filing of this brief *amici curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

by the in-state consumer and collected by the in-state vendor. *Id.* at § 1361. The same sales tax rate applies to the sale of transportation which will take place entirely within the State as applies to the sale of transportation which will take place interstate. Stipulation of Facts ¶ 15 (J.A. 5). The Oklahoma Supreme Court has construed the sales tax statute to apply only to sales occurring within the State, with the sale itself constituting the taxable event. *See* Pet. Br. 11 (citing *Liberty Steel Co. v. Oklahoma Tax Comm'n*, 554 P.2d 8 (Okla. 1976)). Oklahoma imposes no tax on interstate travel sold in other States, even where the travel route passes into or through Oklahoma. Pet. App. A-18 n.1.

SUMMARY OF ARGUMENT

In striking down Oklahoma's sales tax on the in-state sale of bus tickets on the ground that it failed to satisfy the "fair apportionment" prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the court of appeals made two fundamental errors. First, it incorrectly concluded that the "taxed activity" for apportionment purposes is interstate transportation, rather than the in-state sale of such transportation. Second, it assumed that constitutionally valid apportionment could only be accomplished through the imposition of a mileage apportionment formula; hence, it failed to consider the merits of apportionment based on in-state sales. Either of these errors is sufficient to require reversal of the court of appeals' judgment.

1. The Court has explained that the "central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S.

252, 260-61 (1989). The external consistency test, upon which the court of appeals based its decision, assesses compliance with this requirement by asking "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.* at 262. To answer that question, the "activity being taxed" must first be identified.

Here, the activity being taxed is the sale of bus transportation tickets within Oklahoma. Oklahoma's sales tax, as construed by the Oklahoma courts, is imposed upon the in-state sales transaction itself, not the good or service that is sold. *See* Pet. Br. 13. That the Oklahoma tax reaches sales rather than transportation is further evidenced by the fact that Oklahoma imposes no tax on interstate transportation into or through Oklahoma where the ticket for such transportation was purchased in another State. *See* Pet. App. A-18 n.1. The court of appeals thus erred in assuming that the "activity being taxed" (*i.e.*, the activity to which the tax must be apportioned) was interstate transportation, rather than the sale of that transportation. *See* Pet. App. A-5.

When it is recognized that the activity being taxed is ticket sales, it becomes obvious that Oklahoma's tax is, by its very nature and structure, designed to reach only the in-state component of such sales activity—sales transactions taking place within the State, between an in-state vendor and an in-state customer. The fact that some portion of the value a customer derives from an interstate bus ticket corresponds to out-of-state travel does not change this analysis. The Court has consistently held that sales taxes may be imposed even where some or all of the value of the commodity sold corresponds to its expected use in interstate transportation. *See, e.g., Itel Containers Int'l Corp. v. Huddleston*, 112 S. Ct. 1095, 1106 (1993); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986).

In reaching its decision, the court of appeals erroneously relied on *Central Greyhound v. Mealy*, 334 U.S. 653 (1948), a case involving an unapportioned gross receipts tax laid upon interstate bus transportation. The court of appeals' observation that sales taxes have "much in common" with gross receipts taxes cannot give this decision controlling weight here. This Court, in conducting Commerce Clause analysis, has not hesitated to draw distinctions between forms of taxation that are economically similar. *See, e.g., McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330-31 (1944) (contrasting sales and use taxes). The court of appeals' attempt to extend the analysis presented in *Central Greyhound* to the very different tax at issue here is particularly inappropriate given the fact that *Central Greyhound* was the product of an earlier jurisprudential era, in which differences between various forms of taxation were of even greater importance than they might be today.

2. Even if the court of appeals were correct in requiring that the Oklahoma tax be apportioned based on the entire interstate transportation service (rather than the sales activity), its judgment should nevertheless be reversed. Its assumption that only a mileage-based apportionment system would yield constitutionally permissible results, *see* Pet. App. A-7-A-8, was plainly in error. The Court " 'ha[s] long held that the Constitution imposes no single [apportionment] formula on the States' " and has consistently "declined to undertake the essentially legislative task of establishing a 'single constitutionally

mandated method of taxation.'" *Goldberg*, 488 U.S. at 261 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)).

Here, it appears that in-state sales provide an equally valid proxy for the proportion of interstate travel and travel-related services occurring within Oklahoma. In the income tax context, an apportionment formula based solely on sales has been upheld as a constitutionally acceptable measure of in-state activity. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978). In any event, the party challenging a particular method of apportionment bears the burden of demonstrating that the method selected is unfair, *see, e.g., Container*, 463 U.S. at 180-82, and respondent has not even begun to carry this burden. There has been no showing that Oklahoma's tax reaches a greater share of sales receipts than "reasonably reflects the in-state component" of respondent's interstate transportation services. *Goldberg*, 488 U.S. at 262. Indeed, there is no indication that Oklahoma would collect any less tax from respondent if it were to switch from its present system of taxing only in-state sales, to a mileage-based apportionment formula applied to all interstate transportation, wherever sold.

ARGUMENT

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) the Court "specifically reject[ed] the view that the States cannot tax interstate commerce, while at the same time placing limits on state taxation of interstate commerce." *Goldberg v. Sweet*, 488 U.S. 252, 259 (1989). Thus, it is now well established that "interstate commerce may be required to pay its fair share of state taxes." *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 31 (1988). To determine whether a tax on interstate commerce is valid, the Court applies the four-prong test set forth in *Complete Auto*. *See, e.g., Goldberg*, 488 U.S. at 259-60. In striking down the Oklahoma tax, the court of appeals analyzed only one prong of that test—the requirement that a tax on interstate activities be fairly apportioned to activity occurring within the State. *See* Pet. App. A3 - A-8.[2] That analysis was erroneous; Oklahoma's sales tax on bus tickets clearly satisfies the "fair apportionment" requirement.

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[2] Because the court of appeals based its decision on the "fair apportionment" prong, *amici* address only that portion of the *Complete Auto* test in this brief. *Amici* submit, however, that the other prongs of the *Complete Auto* test are easily satisfied as well. It is clear that the activity being taxed—the sale of bus tickets—satisfies the nexus requirement, *see* Pet. Br. 10-11; that the tax, which is applied at the same rate for both intrastate and interstate routes, is nondiscriminatory, *see* Pet. Br. 20; and that the tax is "fairly related to benefits provided the taxpayer." *Complete Auto*, 430 U.S. at 287; *see* Pet. Br. 21.

I. A SALES TAX APPLICABLE ONLY TO SALES OCCURING WITHIN A STATE'S BORDERS IS, BY DEFINITION, FAIRLY APPORTIONED

A. Oklahoma's Sales Tax Reaches Only The In-State Portion Of The Activity Taxed

As the Court explained in *Goldberg*, the "central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." 488 U.S. at 260-61. Hence, the first step in determining whether a state tax reaches only "its fair share of an interstate transaction" is to identify the transaction or activity upon which the tax has been imposed. Here, the transaction which the State of Oklahoma seeks to tax is the in-state sale of transportation tickets (or, put differently, the sale of specified transportation services, for which the ticket serves as a receipt).[3] The fact that the Oklahoma tax targets sales transactions occurring within the State, rather than interstate bus transportation generally, is evidenced not only by the wording and the operation of the statute, but also by the fact that the tax does not extend to any transportation sold outside the State, even when it involves travel into or through Oklahoma. *See* Pet. App. A-18 & n.1.

To determine whether a given tax is "fairly apportioned," the Court "examin[es] whether it is internally and externally consistent." *Goldberg*, 488 U.S. at 261. Here, it is obvious that the Oklahoma

[3] Because a ticket is issued which represents the purchased transportation service, *amici* refer for convenience to "ticket sales." However, *amici*'s arguments do not in any way depend on the existence of a ticket or on any supposed distinction between the sale of a ticket and the sale of the transportation service which that ticket represents. *See* Pet. App. A-5.

tax is internally consistent; if every State were to apply a sales tax on only those bus ticket sales occurring within its borders, there could be no multiple taxation. *See id.*; Pet. App. A-4.

The external consistency test asks a more complex question: "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262. Here, as explained above, the "activity being taxed" is ticket sales. Next, it must be determined whether the tax reaches only the in-state component of that taxed activity. The Oklahoma tax, by its terms and as construed by the Oklahoma Supreme Court, reaches only those ticket sales which occur within the State. *See* Pet. Br. 11 (citing *Liberty Steel Co. v. Oklahoma Tax Comm'n*, 554 P.2d 8 (Okla. 1976)). By definition, the tax reaches only Oklahoma's fair share of the total universe of ticket sales for interstate transportation: it reaches only those sales transactions occurring within the State between in-state vendors and in-state customers, and leaves untouched all sales transactions occurring outside the State.

Thus, like other state taxes which the Court has upheld, the Oklahoma tax is "'apportioned exactly to the activities taxed,' all of which are intrastate." *Standard Pressed Steel Co. v. Washington Dept. of Revenue*, 419 U.S. 560, 564 (1975) (quoting *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 440 (1939)). In *Standard Pressed Steel*, the Court upheld a business and occupations tax measured by the gross receipts from sales made to an in-state customer, despite the fact that the tax on the sales, which were made by an out-of-state manufacturer with help from an in-state representative, "may have

some impact on commerce." *Id. See also Ficklen v. Shelby County Taxing Dist.*, 145 U.S. 1 (1892) (upholding state license tax measured by gross receipts from commissions on sales to local customers) (cited in *Standard Pressed Steel*, 419 U.S. at 564).

As the Court explained in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944), "[a] sales tax is a tax on the freedom of purchase." The Oklahoma sales tax, Okla. Stat. tit. 68, § 1354, is a "garden-variety" sales tax. *Cf. Itel Containers Int'l Corp. v. Huddleston*, 113 S.Ct. 1095, 1107 (1993) (Scalia, J., concurring in part and concurring in the judgment). It has as its object the in-state sales transaction. Its justification is, therefore, not narrowly founded on the benefits provided by the State along a given travel route, as the court of appeals assumed, *see* Pet. App. A-6 - A-7, but is implicitly premised on the full panoply of benefits which Oklahoma provides to facilitate the sales transaction, such as fire and police protection, and, more broadly, the provision of civil order (with its attendant requirements, such as a judicial system) in which markets can thrive and transportation companies can sell their services to customers within the State. The Court made a similar observation in *Goldberg*:

> The benefits that Illinois provides cannot be limited to those exact services provided to the equipment used during each interstate telephone call. Illinois telephone consumers also subscribe to telephone service in Illinois, own or rent telephone equipment at an Illinois service address, and receive police and fire protection as well as the other general services provided by the State of Illinois.

488 U.S. at 267. *See also D.H. Holmes Co.*, 486 U.S. at 32 (upholding Louisiana use tax on direct mail

catalogs originating out-of-state, noting that the State "provides a number of services that facilitate Holmes' sale of merchandise within the State: it provides fire and police protection for Holmes' stores, runs mass transit and maintains public roads which benefit Holmes' customers, and supplies a number of other civic services from which Holmes profits").[4]

The constitutional concern with multiple taxation is not implicated where, as here, a tax is imposed on a transaction that is uniquely intrastate and is justified by benefits that are likewise uniquely intrastate. The broad range of benefits which are provided by Oklahoma to those doing business within its borders (and which justify its use of the general sales tax at issue here) could not form the basis for a tax imposed by any other State. The fact that another State might impose a different tax for a different reason on a different aspect of the same interstate activity

[4] This discussion of the benefits provided by Oklahoma sheds light on the nature and purpose of Oklahoma's sales tax and hence assists in demonstrating that the "activity" which is taxed and to which the tax must be "fairly apportioned" is the sale of transportation, rather than the transportation itself. Of course, it also bears on another of *Complete Auto*'s prongs—the requirement that the tax be "fairly related" to the benefits provided. Under that prong, which was not addressed by the court below, the analysis turns on whether the benefits provided bear some fair relation to the taxes paid. Here, the benefits provided in connection with the sale of tickets would be sufficient on their own to justify the sales tax and to satisfy that prong of the test. In fact, the bankruptcy court specifically observed that "the Debtor received police and fire protection, along with other public services, at the locations where it sells tickets and loads its buses" as well as "police protection and public road maintenance on its Oklahoma routes." Pet. App. A-27–A-28; *see* Pet. Br. 21.

would not present a risk of "multiple taxation" in the constitutional sense. As one commentator explains:

> To extend the cumulative burden concept to condemn taxes which cannot be duplicated in other states on the ground that some other tax of a different nature might also burden the interstate transaction would go beyond the purpose for that concept. . . . Two dissimilar taxes are just as likely to be imposed by the same state as by different states and hence just as likely to impose a heavier burden on local transactions as on interstate transactions.

William B. Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40, 75 (1943).

Thus, even if another State's tax were to be imposed in connection with some portion of the interstate travel which results from ticket sales, see Pet. App. A-14 - A-15; Opp. 9-10, that tax would fall on a different activity (*i.e.*, travel within the other State's borders) and would be designed to compensate for a different set of benefits (*e.g.*, road maintenance and highway patrol protection within such other State). It would certainly not amount to multiple taxation. Indeed, as petitioner notes, Pet. Br. 14, if the existence of another tax on a different aspect of the same interstate business were sufficient to invalidate a State's tax scheme, the fact that an interstate business was subject to income tax in one State would preclude further taxation of any kind by any other State—a result plainly at odds with the law and with reality.

B. Sales Transactions Occurring Within a State's Borders Are Taxable Even Where Out-of-State or Interstate Activity Contributes to the Value of the Item Sold

As discussed above, Oklahoma's tax, by focusing exclusively on sales transactions occurring within Oklahoma, is by its own terms fairly apportioned to reach only Oklahoma's share of sales activity. The court of appeals reached the opposite conclusion by placing controlling weight on the fact that some portion of the value of an interstate transportation ticket necessarily corresponds to transportation that will take place outside the State's borders. *See* Pet. App. A-6. But this line of reasoning is implicitly premised on the notion that a sales tax may be measured by the total sales price of an item only where the entire value of that item is derived from in-state activities —a notion which the Court has consistently rejected. For example, in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Court upheld a tax on the sales proceeds from advertising placed in a journal distributed interstate against the similar challenge that some portion of the value of the advertising to the purchaser corresponded to such interstate circulation: "The tax is not invalid because the value is enhanced by appellants' circulation of their journal interstate any more than property taxes on railroads are invalid because property value is increased by the circumstance that the railroads do an interstate business." *Id.* at 259. *See also Goldberg*, 488 U.S. at 268 n.1 (Stevens, J., concurring) ("A State may assess a sales tax on the entire value of the purchased item even though some amount of that value was added in other States.").

Specifically, the Court has approved sales taxes imposed on items manufactured in other States and

shipped to the taxing State immediately prior to sale, *see, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), taxes on the receipts from the sale of items purchased within the State by an out-of-state buyer who intended to transport them to his home State, *see, e.g., International Harvester Co. v. Department of Treasury of Indiana*, 322 U.S. 340, 345-46 (1944), and, perhaps most relevant for present purposes, sales taxes on items that are designed to be used in interstate transportation and whose purchasers derive part or all of the product's value from such interstate use. *See, e.g., Itel*, 113 S.Ct. at 1106 (sales tax on proceeds from lease of cargo containers used solely in international transit); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986) (sales tax on aviation fuel to be used on international and interstate as well as intrastate flights); *Eastern Air Transp., Inc. v. South Carolina Tax Commission*, 285 U.S. 147 (1932) (sales tax on gasoline to be used in interstate transportation).

From these precedents it is clear that the justification for the sales tax turns not on the fact that the taxing State is the only anticipated site of the enjoyment of a product or service, or the place where the value of the product or service originates. Were such the case, no State could impose any sales tax without first determining what proportion of a product or service's value to the customer could be attributed to activities that have occurred (or that can be expected to occur) in other States—an inquiry which is at odds with common sense notions as to the nature and purpose of the sales tax. Instead, the common denominator in the Court's cases upholding sales taxes is the existence of a sales transaction within the taxing State, and it is this common denominator which

points to the rationale for sales taxes generally: the State's provision of benefits which facilitate a sales transaction within its borders. As the Court explained in *International Harvester*, "[t]he consummation of the [sales] transaction was an event within the borders of Indiana which gave it authority to levy the tax on the gross receipts from the sale." 322 U.S. at 348.

While it is true that the sale of a ticket for transportation is related to the actual interstate travel service provided, the sale remains distinct as a taxable event. Here, as in *International Harvester*, "a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce." 322 U.S. at 346.

C. *Central Greyhound* Did Not Address the Constitutional Validity of a Sales Tax on Interstate Travel Tickets

Respondent, like the court of appeals, places great reliance on this Court's decision in *Central Greyhound v. Mealy*, 334 U.S. 653 (1948). *See* Opp. 7-8; Pet. App. A-5 - A-8. That reliance is misplaced. *Central Greyhound* involved New York's "tax on appellant's gross receipts from transportation"—receipts which were generated by a bus transportation service that operated routes falling partially outside of New York. 334 U.S. at 654. It did not consider the constitutional validity of a sales tax imposed on interstate bus ticket sales, nor did the Court treat the gross receipts tax before it in that case as the functional equivalent of a sales tax. Instead, the Court in *Central Greyhound* analyzed the tax as an "unapportioned gross receipts tax" in accordance with

the construction given it by the New York courts. *See* 334 U.S. at 663. This characterization led ineluctably to the invalidation of the tax. *Id.*[5]

That the Court in *Central Greyhound* did not decide the constitutional status of a sales tax, a different form of taxation than the one before it, is made even more clear when two additional factors are considered. First, the State Tax Commission of New York, in defending the tax at issue in *Central Greyhound*, did not attempt to characterize the gross receipts tax imposed on interstate bus transportation as a sales tax. It did not maintain that the tax was imposed upon the sales transaction as distinct from the transit, or that the tax fell on anything other than the interstate bus transit itself. Instead, New York chiefly argued that no interstate commerce was involved, since each taxed journey began and ended in New York. *See* Br. of Appellees (No. 745, O.T. 1946) at 10-22; *see also Central Greyhound*, 334 U.S. at 666-67 (Murphy, J., dissenting). Hence, the Court was not invited (as it plainly was in *Goldberg, see* 488 U.S. at 268 n.1 (Stevens, J., concurring)) to analogize the tax before it to a sales tax and to assess its constitutionality on that basis.

Second, the *Central Greyhound* decision was the product of a jurisprudential era which predated the

[5] Justice Frankfurter, writing for the Court in *Central Greyhound*, relied heavily on the majority opinion he authored in an earlier case, *Freeman v. Hewit*, 329 U.S. 249 (1946), in which another unapportioned gross receipts tax was invalidated. *See Central Greyhound*, 334 U.S. at 663 ("[b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys'") (quoting *Freeman*, 329 U.S. at 253).

modern and pragmatic *Complete Auto* inquiry. Under that earlier mode of analysis, distinctions between various forms of taxes, whatever their economic similarities might be, were often of controlling weight. The fact that a particular form of taxation was struck down during that era, therefore, provides no basis for now inferring the outcome that might have been reached had a different, albeit economically related, form of taxation been under consideration instead.

When these considerations are viewed in light of Justice Frankfurter's contemporaneous directive in *Freeman* that "especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts," 329 U.S. at 252, it is clear that no controlling principles concerning the validity of Oklahoma's sales tax can be drawn from a case that passed on the validity of a different form of tax altogether, and did so during an era in which such differences assumed an even greater significance than they might today. Thus, the analysis set forth in the *Central Greyhound* context cannot simply be transplanted into the present context; instead, the Oklahoma tax must be analyzed on its own terms.

Accordingly, the court of appeals' rote application of the holding in *Central Greyhound* to the facts of this case cannot be justified by that court's observation, even if it were true, that "[s]ales taxes and gross-receipts taxes have much in common." Pet. App. A-7.[6] That different types of taxes may have

[6] While there may be some economic relationship between sales and gross receipts taxes, *amici* agree with petitioner that the two types of taxes have nothing "in common" that is relevant to the constitutional analysis of the "fair appor-

"much in common" does not establish that they should be analyzed in the same manner for Commerce Clause purposes, nor does it establish, as a matter of historical fact, that the Court intended to settle the constitutional fate of both forms of taxation in a ruling that by its own terms addressed only one. On the contrary, the Court's opinions plainly demonstrate that different forms of taxation may require quite different treatment under the Commerce Clause.

For example, in *McGoldrick*, 309 U.S. at 58-59, the Court distinguished an earlier case, *J.D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 311 (1938), in which a gross receipts tax on goods shipped in interstate commerce was struck down on the ground that such a tax was imposed on activities occurring in other States. The sales tax in *McGoldrick*, which was also imposed on goods shipped in interstate commerce, was held valid since the tax fell only on "a local activity[:] delivery of goods within the state upon their purchase for consumption," which the Court described as "an activity which

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tionment" requirement. *See* Pet. Br. 12-13. Sales taxes are imposed on the in-state sales transaction, while gross receipts taxes are more generally imposed upon the revenue-producing activities of an interstate business, such as the interstate transportation itself. While a sales tax finds its justification in the benefits provided by the State in facilitating the sales activity, a gross receipts tax is justified on the basis of the benefits which enable the interstate business to generate receipts (such as highway maintenance and patrol, in the case of transportation services). The two types of taxes have different purposes, are imposed on different activities, are justified on the basis of different benefits, and are even collected from different parties. In short, they are "on different transactions and for different opportunities afforded by a State." *McLeod*, 322 U.S. at 331 (distinguishing sales and use taxes).

apart from its effect on the commerce, is subject to the state taxing power." 309 U.S. at 58.

Similarly, in *McLeod* the Court made clear that a state tax must be analyzed in accordance with its stated character and purpose; a court may not analyze it "as if" it were another form of taxation imposed on a different aspect of interstate activity and justified by a different set of state-provided benefits, simply because the other form of taxation could have been imposed or would have had a similar economic effect. 322 U.S. at 330-31 (analyzing sales tax by reference to the nature and purpose of a sales tax, rather than as if it were a use tax). The *McLeod* Court went on to explain: "A sale[s] tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds." *Id.* at 330.

Other of the Court's decisions have drawn a distinction between unapportioned taxes "on" gross receipts and taxes on other legitimate objects, such as property, which are merely "measured by" such gross receipts. *See, e.g.*, *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 453 (1918); Laurence H. Tribe, *American Constitutional Law* 463-64 & nn. 18-19 (2d ed. 1988) (collecting cases). Had the tax at issue in *Central Greyhound* been a sales tax measured by the gross receipts from New York sales, rather than a direct tax on the gross receipts themselves, this line of case law suggests that the outcome could have been different.

In any event, it is clear that the Court in *Central Greyhound* had no occasion to consider, and did not

in fact consider, the constitutional validity of a sales tax of the type now before the Court. The *Central Greyhound* Court did not even consider whether the tax before it could be usefully analogized, based on practical factors, to a sales tax.[7] The *Central Greyhound* decision instead turned on the tax's designation as an unapportioned gross receipts tax, and upon the Court's determination that the taxed activity, although beginning and ending within the State, was interstate commerce. To assert now, nearly fifty years later, that the case would have been decided in the same way had a sales tax rather than a gross receipts tax been at issue is to engage in nothing more than pure speculation. Accordingly, *Central Greyhound* cannot control the outcome of this case.

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[7] The Court has drawn upon such analogies in certain instances. *See, e.g., Goldberg,* 488 U.S. at 262 ("The tax at issue has many of the characteristics of a sales tax."); *International Harvester,* 322 U.S. at 349 ("gross receipts" tax applied to "interstate transactions consummated within [Indiana's] borders" operated in the same manner as a sales tax; " 'the local activities or privileges' " upon which the tax was based were "as adequate to support this tax as they would be to support a sales tax") (citation omitted). That the Court did not draw such an analogy in *Central Greyhound* is unsurprising for the reasons detailed above; that the Court chose to do so in *International Harvester,* a relatively contemporaneous case, is a testament to the "wavering doctrinal lines of [the Court's] pre-*Complete Auto* cases." *Goldberg,* 488 U.S. at 259.

II. STATES MAY EMPLOY AN APPORTIONMENT FORMULA THAT USES IN-STATE SALES, RATHER THAN MILEAGE, AS A MEASURE OF THE STATE'S SHARE OF INTERSTATE TRANSPORTATION ACTIVITIES

As *amici* discuss above, the appropriate activity to be considered in determining whether the Oklahoma tax satisfies the fair apportionment prong of *Complete Auto* is the activity which Oklahoma has chosen ot tax: ticket sales. *See* pages 8-12, *supra.* Yet even if the Court were to find that the interstate transaction or activity to which the tax must be fairly apportioned is the entire transportation service provided to customers, rather than the sale of that service, the Oklahoma tax still satisfies the fair apportionment requirement. The court of appeals' holding to the contrary is premised upon the erroneous notion, repeatedly disavowed by the Court, that States are required to employ a particular mileage-based apportionment formula in taxing interstate transportation.

A. The Constitution Does Not Require States To Apply Any Particular Apportionment Method Or Formula

The Court " 'ha[s] long held that the Constitution imposes no single [apportionment] formula on the States' "; accordingly, it has consistently "declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.' " *Goldberg,* 488 U.S. at 261 (quoting *Container Corp. of America v. Franchise Tax Bd.,* 463 U.S. 159, 169 (1983)). Thus, the Court has given the States considerable latitude in determining appropriate apportionment formulas, and has upheld taxes based on a wide variety of factors. *See, e.g., Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines,* 405 U.S. 707, 715-16 (1972) (collecting

cases); *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 296-97 & n. 26 (1987); *see also* Paul J. Hartman, *Federal Limitations on State and Local Taxation* 29 (1981). As the Court reiterated in *Goldberg*, neither the Constitution nor the Court's precedents require a State to base its apportionment formula on any particular factor, such as mileage. *See* 488 U.S. at 261. Instead, the constitutional validity of an apportionment formula is determined by reference to the internal and external consistency tests. *Id.*

In light of these precedents, the court of appeals' apparent assumption that "fair apportionment" could only be achieved through a mileage-based formula was clearly incorrect. Despite the recognized validity of a mileage apportionment formula and its apparent ease of administration, it is not the only method of tax apportionment which will yield constitutionally permissible results.[8] Here, it appears

[8] It is, of course, well settled that "[w]here transportation is concerned, an apportionment according to the mileage within the state is an approved method." *Canton R.R. Co. v. Rogan*, 340 U.S. 511, 515-16 (1951); *see Goldberg*, 488 U.S. at 264 & n.14 (collecting cases). Like other apportionment formulas, however, a mileage-based formula for taxing passenger transportation operates in the realm of rough approximation rather than mathematical precision.

While mileage may play some role in fare setting, there are numerous other factors at work in the complex realm of determining prices for intercity passenger transportation, which make it impossible definitively to identify particular fare dollars with particular stretches of road. *See, e.g.*, Roy J. Sampson *et al.*, *Domestic Transportation: Practice, Theory, and Policy* 367 (6th ed. 1990) (in transportation price setting, "[p]roblems of supply and demand, or of costs and value of service, regulation and legal obligations, competition and capacity, and the forces of tradition are intricately interwoven

that in-state sales receipts provide an equally valid proxy for the proportion of interstate travel and travel-related services occurring within Oklahoma. Indeed, in a related context the Court has accepted sales as an appropriate measure of an interstate business's in-state activity. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978).

While some in-state sales taxed by Oklahoma may be for travel taking place partially outside the State, other travel and travel-related activities occurring inside the State are not the subject of in-state sales, and hence are not taxed at all (*i.e.*, where a ticket is purchased in another State for travel into or through Oklahoma). *Cf. Goldberg*, 488 U.S. at 269 (Stevens, J., concurring) ("Although Illinois taxes the entirety of every call charged to an Illinois number, it does not tax any part of the calls that are received at an Illinois number but charged elsewhere.").[9] Moreover, it is probable that customers

into a pattern of chaos and confusion not unlike the Gordian knot"); *see also* Robert C. Lieb, *Transportation* 187-96 (3d ed. 1985) (discussing various cost and demand factors relevant to pricing of transportation). For example, competitive conditions within a particular market may require price cutting and special discounts, which erode the relationship between price and distance. *See, e.g.*, Adam Bryant, "New York-Washington for $5 Is Cheapest Fare Since 1952," *New York Times*, August 8, 1992 at A1 (discussing fare war between bus lines). Moreover, some portion of any given fare goes to cover services that do not vary with distance traveled, such as those provided at the terminal or in connection with the making of reservations. *See* John R. Meyer and Clinton V. Oster, Jr., *Deregulation and the Future of Intercity Passenger Travel* 221-22 (1987).

[9] While in-state sales receipts may not relate to the in-state proportion of interstate transportation with perfect ac-

who purchase tickets in Oklahoma disproportionately benefit from in-state travel services and amenities (such as those provided at bus terminals within Oklahoma) which facilitate interstate transportation and which constitute some undefined, but significant, segment of the ticket price. *See* Meyer & Oster, *Deregulation* at 222 (discussing terminal costs); *supra* note 8. Ticket sales within the State are also likely to be correlated with advertising and marketing activities conducted within the State.

B. There Has Been No Showing That Oklahoma's Sales-Based Method of Apportionment Reaches a Disproportionate Share of Interstate Activity in Violation of the Commerce Clause

It is well settled that the party challenging a particular method of tax apportionment must bear the burden of demonstrating that the method selected results in distortions or disproportionate burdens on interstate commerce. *See, e.g., Container*, 463 U.S. at 180-82 (party challenging income tax apportionment "has the burden of proof; it must demonstrate that there is 'no rational relationship between the income attributed to the State and the intrastate values of the enterprise'") (citations omitted); Hartman, *Federal Limitations on State and Local Taxation* at 29 ("The States have wide latitude in the selection of apportionment formulas, and the application of the formula will not be upset on due process or commerce clause grounds, unless the taxpayer carries a heavy burden of proof.").

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curacy, such "imperfect proxies" are constitutionally acceptable, as long as they are not shown to be "out of all appropriate proportion to the business transacted" in the State. *See Container*, 463 U.S. at 180-83.

Here, even if one assumes that the "activity" to which the Oklahoma tax must be fairly apportioned is the entire package of interstate transportation and related services provided by interstate passenger transportation companies such as respondent, there has been no demonstration that apportionment based on sales receipts within the State overrepresents the amount of such activity occurring in Oklahoma. On the contrary, as the discussion in the foregoing section explains, it appears that sales within Oklahoma would "reasonably reflect[] the in-state component" of the interstate transportation activity. *Goldberg*, 488 U.S. at 262.

Significantly, there has been no showing that Oklahoma would collect less tax revenue than it presently does if it were to implement the mileage-based apportionment formula endorsed by the court of appeals. Were Oklahoma to use a mileage-based formula, rather than its current sales-based method of apportionment, it would clearly be entitled to apply that mileage-based formula to *all* of respondent's gross receipts from ticket sales, regardless of the place of sale. In other words, while Oklahoma would be able to tax in-state sales to a lesser degree than it does under the present system, it would also be able to tax interstate travel within its borders where the tickets for such travel were sold out of state. The net result is uncertain; certainly no evidence has been presented to show that Oklahoma's "share" of tax under the mileage apportionment scheme would be less than the present share it seeks to collect through its sales tax.

Given the lack of any record as to the relative merits of the two means of apportioning the interstate activity at issue, it would plainly be inappropriate for the Court to require Oklahoma to scrap

its own carefully targeted taxation scheme in favor of an entirely different method of tax apportionment. Respondent has not even begun to carry the heavy burden of proof associated with showing Oklahoma's apportionment method to be invalid.

Finally, the fact that another State might choose to apportion taxes based on mileage or some other factor does not establish an unconstitutional risk of multiple taxation. The possibility that varying apportionment formulas will overlap is inherent in the latitude retained by the States to establish tax policy; it does not justify invalidation of a fairly apportioned tax. *See Moorman*, 437 U.S. at 278. Congress must decide whether such risk of overlap is significant enough to require imposition of a uniform tax formula, since "[i]t is to that body, and not this Court, that the Constitution has committed such policy decisions." *Id.* at 280. Accordingly, this Court should again "decline[] to undertake th[is] essentially legislative task . . . ." *Goldberg*, 488 U.S. at 261.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the*
Amici Curiae

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